Illinois Official Reports

Appellate Court

People v. Luna, 2025 IL App (2d) 240382

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DRESHAWN L. LUNA, Defendant-Appellant.
District & No.	Second District No. 2-24-0382
Filed	March 24, 2025
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 10-CF-4004; the Hon. Mark L. Levitt, Judge, presiding.
Judgment	Judgment reversed; cause remanded with directions.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and Christopher R. Bendik, of State Appellate Defender's Office, of Chicago, for appellant. Brian J. Towne, Patrick Delfino, Edward R. Psenicka, and David S. Friedland, of State's Attorneys Appellate Prosecutor's Office, of Elgin, for the People.
Panel	JUSTICE JORGENSEN delivered the judgment of the court, with opinion. Justices Hutchinson and Schostok concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Dreshawn L. Luna, requests this court to remand for a hearing regarding whether he should be sentenced as an adult. Defendant argues that the trial court erred where it declined to hold such a hearing because it believed doing so would violate an earlier mandate from this court. For the following reasons, we agree with defendant and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 A. Appeal and Mandate

¶ 4 Over the past 13 years, this case has developed a somewhat convoluted procedural history. Thus, we recount only the information necessary to resolve the issues presented in this appeal.

¶ 5 Defendant was born on March 13, 1995. Shortly after turning age 15, on July 4, 2010, he shot two people, killing one, over a game of dice. At that time, due to the combination of defendant's age and the offenses, the Juvenile Court Act of 1987 (Act) required that he be tried and sentenced as an adult. 705 ILCS 405/5-130(1)(a) (West 2010) (providing that a minor at least *15 years old* who was charged with first degree murder or aggravated battery with a firearm (where the minor personally discharged a firearm) was excluded from the definition of a delinquent minor under the Act and "shall be prosecuted under the criminal laws of this State"). In 2012, a jury convicted defendant of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated battery with a firearm (*id.* § 12-4.2(a)(1)). The sentencing provisions then in effect under the Unified Code of Corrections (Code) mandated certain minimum sentences and sentence enhancements, regardless of age, as well as consecutive sentencing and "truth in sentencing," and thus, the trial court sentenced defendant to 61 years' imprisonment (26 years for the murder, plus 25 years as an enhancement for personally discharging a firearm that proximately caused death, consecutive to 10 years for aggravated battery). See 730 ILCS 5/3-6-3(a)(2)(i), (ii), 5-8-1(a)(1)(d)(iii), 5-8-4(d)(1) (West 2010).

¶ 6 In 2015, on direct appeal, this court affirmed defendant's conviction and rejected defendant's argument that his sentence was unconstitutional. *People v. Luna*, 2015 IL App (2d) 121216-U, ¶¶ 36-38. Defendant filed a petition for leave to appeal to the supreme court, seeking review of our ruling on the constitutionality of the statutes that resulted in his being tried and sentenced as an adult. In 2016, while defendant's petition for leave to appeal remained pending, the legislature amended section 5-130(1) of the Act, raising the age for automatic transfer to adult court to *16 years*. Pub. Act 99-258, § 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130(1)). In a motion later filed with this court, defendant represented that, in August 2016, he filed an amended petition for leave to appeal to the supreme court, in part asking it to answer whether the change to section 5-130(1)(a) of the Act applied to his case. Ultimately, the supreme court did not answer that question. Rather, after the petition and the amended petition had been pending for several years, the court denied defendant's petitions and entered a supervisory order, directing this court to (1) vacate our prior judgment, (2) consider the effect of *People v. Buffer*, 2019 IL 122327 (defining a *de facto* life sentence as one exceeding 40 years' imprisonment), on whether defendant's sentence constituted a *de facto* life sentence, and (3) determine if a different result was warranted. *People v. Luna*, No. 119310 (Ill. Mar. 25, 2020) (supervisory order).

¶ 7 On remand, we allowed supplemental briefing on the issue of *Buffer*'s effect on the constitutionality of defendant's sentence. On September 29, 2020, we again affirmed defendant's conviction, but we vacated his sentence and remanded for a new sentencing hearing. *People v. Luna*, 2020 IL App (2d) 121216-B. Specifically, we noted that we maintained our original holdings on all issues, "except the *constitutionality* of defendant's sentence." (Emphasis added.) *Id.* ¶ 20. We summarized emerging case law addressing the constitutionality of juvenile life sentences under the eighth amendment (U.S. Const., amend. VIII) and the proportionate penalties clause (Ill. Const. 1970, art. I, § 11), including, as instructed, *Buffer*'s parameters regarding a juvenile *de facto* life sentence, and we also revisited the statutory sentencing scheme that had, at the time of defendant's sentencing, mandated that he receive a *de facto* life sentence. *Luna*, 2020 IL App (2d) 121216-B, ¶¶ 21-24. We considered the attention given at sentencing to defendant's youth, rejected the State's arguments that his sentence remained constitutional, and found it "prudent," particularly "given the legal developments since defendant was sentenced," to "err on the side of concluding that defendant's sentence *violates the eighth amendment* and that he is *entitled* to *a new sentencing hearing*." (Emphases added.) *Id.* ¶¶ 25-27. We then noted that, although the court had expressed during sentencing that it was required to apply the firearm enhancement, the sentencing scheme had since changed to afford sentencing courts discretion on applying the enhancement. *Id.* ¶ 28. We further emphasized that the framework for sentencing juvenile defendants to life imprisonment had evolved; that the crimes defendant committed were consistent with impulsive and immature behavior; and that defendant's presentence report reflected "glimmers of hope" with respect to his grades, participation in group activities, and relationships. *Id.* ¶ 30.

¶ 8 Finally, we summarized that courts look to evolving standards of decency and that the "framework for sentencing juveniles ha[d] markedly evolved since defendant's sentence was imposed here." *Id.* ¶ 31. We noted some of those changes, including section 5-4.5-105 of the Code (730 ILCS 5/5-4.5-105(a) (West 2016)), which codified factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012) (recognizing special considerations for juvenile offenders), and which was not at the trial court's disposal during defendant's sentencing hearing. *Luna*, 2020 IL App (2d) 121216-B, ¶ 31. Accordingly, we held, "defendant is *entitled* to a new sentencing hearing under the scheme prescribed by section 5-4.5-105 of the Code." (Emphasis added.) *Id.* We instructed that the sentencing judge could not at the new hearing simply claim to have applied the *Miller* factors but must actually *use* those factors to evaluate the evidence. *Id.* We specified that we expressed no view on the sentence that defendant should ultimately receive. *Id.* Finally, we held that, "[i]n sum, we affirm defendant's conviction, vacate his sentence, and remand for resentencing in accordance with this decision." *Id.* ¶ 32. Our decision specified that the judgment was "affirmed in part and vacated in part. The cause is remanded for resentencing." *Id.* ¶ 34.

¶ 9 The State filed a petition for leave to appeal with the supreme court. After requesting multiple extensions, it moved to dismiss the petition, which the supreme court granted in January 2021. Therefore, our mandate to the trial court issued on February 25, 2021, and read: "Affirmed in part, vacated in part, cause remanded."

¶ 10 B. Proceedings Concerning Sentencing on Remand

¶ 11 On remand, both parties filed motions regarding whether defendant should be sentenced as an adult under the Code or, rather, as a juvenile. Specifically, on August 3, 2021, defendant filed a "motion for sentencing as a juvenile and motion to dismiss." He noted that his sentence had been vacated and, thus, proceedings were ongoing and the 2016 amendments to the Act, which changed the age for excluded jurisdiction from 15 to 16, applied to him. See 705 ILCS 405/5-130 (2016). As such, section 5-130(1)(c)(ii) of the Act required the State to file, within 10 days following the entry of a finding or the return of a verdict, a motion to sentence defendant as an adult under the Code, upon which time the court must hold a hearing to determine whether to sentence defendant as a juvenile or as an adult. *Id.* § 5-130(1)(c)(ii).[1] However, as the State had not filed such a motion within 10 days of remand, defendant argued, he should be discharged because he was now older than 21 years of age and further proceedings under the Act were not authorized. Relying primarily on *People v. Fort*, 2017 IL 118966, ¶ 41, and *People v. Clark*, 2020 IL App (1st) 182533, ¶¶ 70-71, defendant argued that the proper remedy in these circumstances was the entry of an order sentencing him to time served as of March 13, 2016, the date of his twenty-first birthday, releasing him, and dismissing the case.

¶ 12 On August 8, 2021, the State, in turn, filed a "Motion to Sentence Defendant Pursuant to Chapter V of the Unified Code of Corrections." The State argued that this court had vacated defendant's sentence and remanded for proceedings in accordance with our decision, which provided that defendant was "entitled to a new sentencing hearing under the scheme prescribed by section 5-4.5-105 of the Code." Therefore, the State argued, the trial court was bound by our mandate to sentence defendant pursuant to only the Code. However, "[a]lternatively, the People request, *pursuant to section 5-130(1)(c)(ii)*[,] that this court conduct a hearing to determine if defendant [should] be sentenced as an adult under Chapter V of the [Code]." (Emphasis added.)

¶ 13 In addition to its motion, the State responded to defendant's motion, noting that, based on the statute and relevant case law, "defendant is correct that the 2016 amendments *may* generally apply to [him]." (Emphasis in original.) After summarizing relevant cases, the State asserted that, "[u]nder controlling case law, it appears generally that defendant may elect to proceed under the amendment to section 5-130(1)." Nevertheless, the State argued, this court had remanded with instructions that defendant be sentenced pursuant to section 5-4.5-105 of the Code, and therefore, the trial court was bound by this court's mandate. The State also proposed that, because defendant did not raise this issue before this court, he was bound by the law-of-the-case doctrine. Finally, the State argued alternatively that, because defendant may elect between sentencing laws in effect at the time of the crime's commission or those in effect at the time of sentencing, it would have 10 days from defendant's election to file a motion for adult sentencing.

¶ 14 On August 31, 2021, the trial court held a hearing on defendant's motion. The court posed a few questions, prompting the parties to file supplemental memoranda. In its memorandum,

[1]In sum, section 5-130(1)(a) now provides that, if the minor defendant is at least age 16 and committed certain offenses, he or she is subject to adult criminal court. 705 ILCS 405/5-130(1)(a) (West 2016). If the defendant is under age 16, however, section 5-130(1)(c)(ii) provides that the court "must proceed" in juvenile court, unless the State requests a hearing for the purpose of sentencing the defendant under chapter V of the Code. *Id.* § 5-130(1)(c)(ii).

the State again focused on this court's mandate and that defendant did not ask this court for the remedy he seeks now and is bound by the law of the case.[2] Finally, it noted that it had filed a timely motion for defendant to be sentenced as an adult, should its other arguments be rejected. Ultimately, on October 28, 2021, the court denied defendant's motion for sentencing as a juvenile. It reasoned that this case was different (from cases where the amendments were found to apply), because

> "the possible juvenile sentencing in this case was being raised for the first time on remand and in my view this is a very significant procedural difference because it is well established that when a reviewing court issues a mandate it vests the trial court with jurisdiction to take only such action as conforms to that mandate. Any other order issued by me would be void for lack of jurisdiction. And it seems to me that even though defense counsel has very eloquently suggested that I have the ball in my court and that I can do what I want with this case, I think that I'm bound by what the Appellate Court's directions were. And this is true even where an Appellate Court's directions are erroneous. I am required to strictly follow those directions.
>
> Here the Appellate Court mandate, which I have read and reread and read some more, states that, quote, in sum, we affirm defendant's conviction, vacate his sentence and remand for sentencing in accordance with this decision. And that's—I'm quoting directly from the remand. Their decision, and if you read it carefully and over and over, focuses solely on the applicability of [the] *Miller* and *Buffer* line of cases to [defendant]. *The Appellate Court did not anywhere in their opinion discuss the consequences of the 2016 amendments applying retroactively in his case and certainly didn't instruct me concerning this issue*.
>
> As a result I find that for me to address the consequences of those 2016 amendments being applied retroactively in this case would be outside the scope of my authority. It would thwart the Appellate Court's mandate and I simply do not have the jurisdiction under this mandate to address this issue. For those reasons the defendant's motion is respectfully denied." (Emphasis added.)

¶ 15 On December 16, 2021, after a hearing, the trial court sentenced defendant to 33 years' imprisonment (25 years for first degree murder, consecutive to 8 years for aggravated battery with a firearm). That same day, defendant filed a motion to reconsider the sentence. However, apparently due to postconviction proceedings, a premature appeal that defendant voluntarily dismissed, and a *nunc pro tunc* order that the parties later agreed was a nullity, the court's order denying defendant's motion to reconsider was not heard and denied until June 18, 2024. Defendant timely appealed.

¶ 16 C. Court's Comments Regarding Parties' Agreement to Reduce Sentence

¶ 17 Prior to defendant's timely notice of appeal but after resentencing, defendant and the State, pursuant to section 122-9 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-9 (West 2022)), came to an agreement to petition the trial court to reduce defendant's sentence to 20 years. On October 11, 2022, they appeared before the court and represented that defendant planned to plead guilty to first degree murder, in exchange for a sentence of 20 years, with credit for time served. The court, however, questioned why it would enter such an agreement.

[2]The argument based on the law-of-the-case doctrine seems to have been abandoned.

"I do not go along with this agreement, not at all." It noted that the pleading gave no basis or reason for why the court should accept the agreement, particularly where it presided over defendant's initial sentence and entered the sentence that it found lawful and appropriate at the time and had entered a new sentence that was considerably reduced after the remand. The court stated, "[w]hat you're asking me to do is extraordinary. I don't see a reason to do it at this time."

¶ 18 Defense counsel started to respond, but the court continued, stating, "No. *** I spend a lot of time dealing with the cases and dealing with the people that come before me. I spend a lot of time and effort on trying to do what I believe is right and appropriate for both sides." It explained that the State's motion did not provide any information with respect to "what claims you have that have merit that would persuade me to reduce [defendant's] sentence further. I'm happy to listen to it, but I'm not going to preside over an agreed plea with an agreed sentence with an agreed resentence all at the same time. I don't think it's appropriate." Defense counsel explained that, after much discussion and work with the State, she anticipated that, in exchange for the 20-year sentence, defendant would not pursue postconviction proceedings. The court emphasized that it was not foreclosing the parties from submitting additional information and that, if the State believed that there was a valid reason to proceed with another sentencing hearing, it would do so. But it wished to hear the justification and basis for reducing the sentence. The court continued,

> "[The] *parties* forget. You weren't there. I was. I went through this trial. I went through this sentencing hearing. I am aware of facts and circumstances which you may or may not be from the cold record. I observed [defendant's] conduct throughout the trial, throughout all the time it was before me. I am impressed that he has become something much more than he was at the time that I first had to deal with him, but I don't think that based on what I have before me at this time I see a clear path towards merely undoing everything and saying here's a do-over. I don't understand it. I really don't understand it. I don't know what *the parties* are thinking either. I really don't." (Emphases added.)

¶ 19 The court reiterated that it was "happy to listen" but would not proceed blindly and enter a 20-year sentence with no basis. The parties emphasized that they were in "significant agreement," and they requested an off-the-record conference with the court. Before proceeding to conference, the assistant state's attorney commented,

> "Your Honor, I did want to state one thing for the record, and I will talk about it in chambers, but I do want to state that I've worked a long time alongside one of the deputy directors of our office on the appellate issues, the postconviction issues. I've also met a number of times with the victim's mother in this matter.
>
> And so I wanted the Court to be aware and the record to be clear that there's been a lot of work leading up to this moment. It wasn't a willy-nilly, you know, decision on the State's part to present this to the Court."

¶ 20 The conference was held. The court continued the case to November 15, 2022, to consider the parties' proposal. However, it does not appear that the court ever formally rejected the parties' agreement. No further mention of the motion was made by the court or the parties until August 15, 2023, the date of the third-stage hearing on defendant's postconviction petition. At that time, defendant's attorney commented,

"Before I begin[,] it's—and I have to tell you I'm a little bit nervous, my stomach has been in knots this whole morning about this—but I want to address what I consider to be an elephant in the room here.

As you know, we worked very hard—and I hope you don't mind me speaking for you, Mr. Towne [(the assistant state's attorney)]—worked very hard with the victim's family to come up with a resolution in this case. And we did come up with a resolution, a plea for 20 years on first degree murder; and Your Honor rejected the deal which is totally in your purview to do. I'm not saying you didn't have the right to do that. You absolutely did.

But you seemed really, really angry at us about it. Your voice was raised. You were—you seemed mad, and I'm—I'm—I'm addressing it because I'm worried that whatever it was that caused you to be so angry about that might spill over into this, and it's not that I think—I have no doubt that you are able to hear the evidence, assess it and come up with a ruling. I have no doubt about that. But I just felt that in fairness to my client that I needed to mention—to mention that, so. Okay."

¶ 21 II. ANALYSIS

¶ 22 A. Mandate Did Not Preclude Requested Hearing

¶ 23 Defendant requests this court to remand the case for the trial court to conduct a hearing in compliance with section 5-130(1)(c)(ii) of the Act. He asserts that, if the court determines he should *not* be sentenced as an adult, it should order his immediate release, as he is over age 21 and must be discharged. Defendant argues that the court was incorrect to deny his request to be sentenced as a juvenile (and, by extension, the State's alternative request to hold a hearing on that issue) on the basis that this court's mandate purportedly limited its authority to hold that hearing. For the following reasons, we agree.

¶ 24 Whether, after a remand, a trial court exercised its discretion within the bounds of the remand is a question of law reviewed *de novo*. See *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351-52 (2002).

¶ 25 As previously noted, the supreme court ordered this court to consider whether *Buffer* had an effect on defendant's sentence and, in considering that question, we held that, indeed, given evolving authority, defendant's sentence violated the eighth amendment and he was "*entitled* to a new sentencing hearing under the scheme prescribed by section 5-4.5-105 of the Code." (Emphasis added.) *Luna*, 2020 IL App (2d) 121216-B, ¶ 31. We explained that a sentencing court could not simply claim to have applied the *Miller* factors but must actually use them to evaluate the evidence. *Id.* However, we expressed "no view about the sentence that defendant should ultimately receive." *Id.* We affirmed defendant's conviction, vacated his sentence, and remanded for resentencing in accordance with our decision. *Id.* ¶ 32. Our concluding paragraphs and mandate stated that the judgment was "affirmed in part and vacated in part. The cause is remanded for resentencing." *Id.* ¶¶ 32-36.

¶ 26 On remand, the trial court was properly mindful of well-settled authority that, when a reviewing court issues a mandate, the trial court is vested with jurisdiction to take only such action as conforms to the mandate and, even if the directions are erroneous, the trial court must strictly follow them. See *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982) ("a trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing

court"). These principles are not in dispute. Indeed, the State relies almost exclusively on *People v. Reyes*, 2023 IL App (2d) 210423, ¶¶ 56-61, *vacated by* No. 129592 (Ill. Sept. 27, 2023) (supervisory order), where this court determined that a trial court ran afoul of the mandate when it was specifically instructed that it could impose a *de facto* life sentence *only* if it determined that the defendant was beyond rehabilitation but, on remand, it instead imposed a *de facto* life sentence without making that finding. See, *e.g.*, *People v. Brown*, 2022 IL 127201, ¶¶ 11-16 (the supreme court's mandate instructed the court to enter a specific order, but instead, the trial court vacated the order after entering it); *Schreier*, 92 Ill. 2d at 274-75 (the supreme court's mandate instructed the trial court to resentence the defendants, and although the defendants had not cross-appealed their convictions or sentences, the trial court instead granted them a new trial). Indeed, in these cases, the majority opinions held that the trial courts on remand had exceeded their authority by not following the specific instructions given.[3] As such, we certainly would agree that if, on remand, the trial court here had hypothetically resentenced defendant under the Code without applying *Miller* or section 5-4.5-105, such actions would have been inconsistent with our mandate.

¶ 27 However, it is also well established that a mandate limits a court only to questions the reviewing court addressed and answered. Indeed, if

> "the questions involved, or any of them, are not decided upon their merits by [a court of review], and the cause is reversed and remanded to the lower court with directions to proceed in conformity with the opinion of this court, then only the legal principles involved and which have been announced in its opinion by [the court of review] will control the lower court in its further consideration of the questions involved in the case which have not been determined on their merits in this court [of review]." *Noble v. Tipton*, 222 Ill. 639, 648 (1906).

A mandate that reverses is "final upon all questions decided." *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 305 (1981). But only a decision on the *merits* of a question deprives the lower court of the ability to take further action on that question. See *Roggenbuck v. Breuhaus*, 330 Ill. 294, 298 (1928) (after a bench trial, the appellate court reversed, ordering further proceedings not inconsistent with the views set forth in the opinion; ultimately, the supreme court held that the trial court erred on remand, where the trial court believed that the appellate court mandate precluded it from allowing a jury trial or the introduction of new evidence, noting that, when a judgment is reversed and remanded with directions to proceed in conformity with the opinion, it is the trial court's "duty" to proceed on the hearing "just as if the cause was then being heard for the first time"); see also *Clemons*, 202 Ill. 2d at 353 (the supreme court held that the trial court's order did not conform to the mandate, even though the mandate did not explicitly order the trial court to allow the plaintiff to amend the complaint, because, in the absence of specific instructions, the content of the opinion is significant); *Pioneer Trust & Savings Bank v. Zonta*, 96 Ill. App. 3d 339, 341, 345 (1981) (appellate court held that the plaintiffs were "entitled" to expenses, including attorney fees, and remanded for

[3]We note that, even with purportedly specific mandates, assessing whether the mandate was, in fact, exceeded on remand can be challenging, as evidenced by dissenting opinions in each of the previously cited cases. See *Brown*, 2022 IL 127201, ¶¶ 35-58 (Michael J. Burke, J., dissenting, joined by Garman and Overstreet, JJ.); *Schreier*, 92 Ill. 2d at 280-83 (Simon, J., dissenting); *Reyes*, 2023 IL App (2d) 210423, ¶¶ 66-76 (Birkett, J., concurring in part and dissenting in part).

" 'proceedings not inconsistent with this opinion' "; on remand, the trial court did not violate that mandate, where it granted the defendant's motion to conduct a postmandate hearing on the issue of damages).

¶ 28 Thus, the question here is what our mandate actually considered and decided, because a mandate does not preclude the trial court on remand from taking actions not specified but still in conformance with the mandate. Several cases are instructive. For example, in *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1037-38 (2011), this court explained that our general mandate stated that the case was " 'vacated and remanded for an evidentiary hearing on the defendant's postconviction petition' "; further, we noted that our holding that the hearing had to address whether, for purposes of a newly-discovered-evidence claim, an affidavit was of such conclusive nature that it would probably change the result on retrial "did not otherwise dictate the scope of the evidentiary hearing." Therefore, we concluded, the trial court's actions allowing the defendant to amend his postconviction petition and to present a *new* claim at the evidentiary hearing did not exceed our prior mandate. Similarly, in *People v. Abraham*, 293 Ill. App. 3d 801, 806 (1997), this court vacated the defendant's conviction of armed violence and remanded the cause "for further proceedings to allow the defendant to plead anew to the charge of armed violence." We later held that the mandate had not, however, precluded on remand the State's reinstatement of previously dismissed charges. *People v. Abraham*, 324 Ill. App. 3d 26, 29-32 (2001). We noted that "[i]ssues not actually decided by the reviewing court, as well as those not at issue in the appeal, may be considered following remand," and we refused to read the mandate's language in an "unnaturally constrained manner" to vest the trial court with authority *only* to allow the defendant to plead anew to the charge of armed violence. *Id.* at 30-31. We explained, "the obvious implication of the remand order, *given the context in which it was issued*, is that the cause would continue in an ordinary manner as if defendant had not originally pleaded guilty." (Emphasis added.) *Id.* at 31.

¶ 29 Recently, and most similar to the case here, are the First District decisions in *People v. Martinez*, 2023 IL App (1st) 220844-U, and *People v. Martinez*, 2018 IL App (1st) 132670-U.[4] Like defendant here, the defendant in *Martinez* was 15 years old at the time of the offense and was sentenced to a *de facto* life sentence. In an initial decision, the appellate court determined that the sentence was imposed without adequate consideration of his youth and its attendant circumstances, in violation of the eighth amendment, and that, while it expressed no view on the sentence that the defendant should ultimately receive, he was "entitled" to be resentenced under the new statute laid out under section 5-4.5-105 of the Code. *Martinez*, 2018 IL App (1st) 132670-U, ¶¶ 1-2, 65, 72-74. Notably, the court summarized its ruling as, "[w]e affirm defendant's conviction, vacate his sentence, and remand for resentencing *in adult criminal court.*" (Emphasis added.) *Id.* ¶ 2. Its conclusion similarly provided that it affirmed the conviction and vacated the sentence, and it stated that "[w]e remand for resentencing *in adult criminal court*, in accordance with the new juvenile-sentencing provisions" in section 5-

[4]*Martinez*, 2018 IL App (1st) 132670-U, precedes the 2021 amendment to Rule 23 that allows the citation of nonprecedential orders for persuasive purposes. See Ill. S. Ct. R. 23(e)(1) (eff. Feb. 1, 2023). However, the procedural steps at issue there bear directly on the resolution of *Martinez*, 2023 IL App (1st) 220844-U, which the parties can properly cite for persuasive purposes.

4.5-105.[5] (Emphasis added.) *Id.* ¶ 81. The judgment line stated, "[a]ffirmed in part and vacated in part. Remanded for resentencing with directions." *Id.* ¶ 82.

¶ 30 On remand, the defendant filed a motion with the trial court, arguing that, because the trial proceedings had been reopened in that he was being resentenced, recent amendments to the Act should apply. *Martinez*, 2023 IL App (1st) 220844-U, ¶ 9. However, the trial court "*saw nothing in [the appellate court's] mandate* that ordered the [trial] court to order a discretionary transfer hearing or to treat defendant as a juvenile; thus the court resentenced him, as an adult, to 33 years in prison, after conducting a *Miller* hearing." (Emphasis added.) *Id.* On appeal, the court determined that the trial court erred in resentencing the defendant without allowing the State, if it chose, to petition to have the defendant sentenced as an adult, at which point the court would conduct the discretionary hearing under the Act's new provisions. *Id.* ¶¶ 1-3, 19. It ordered,

> "Defendant's sentence is vacated. On remand, the State should be given an opportunity to petition under section 5-130(1)(c)(ii) [of the Act] to have [the] defendant sentenced as an adult. If it does not do so, or if the court determines that [the] defendant is not subject to adult sentencing, the proper remedy is to discharge [the] defendant, as he is over 21 years of age." *Id.* ¶ 19.

¶ 31 Although the only rationale provided for the trial court's refusal to hold the hearing was that there was nothing specific in the mandate ordering it to do so, the *Martinez* court did not analyze whether the trial court's interpretation of the mandate was incorrect. However, it implicitly determined that holding the hearing remained consistent with its mandate. Indeed, it *necessarily* determined that the trial court's interpretation of the mandate was incorrect, as it held that the trial court erred where it sentenced the defendant as an adult (per the mandate) without first holding the requested hearing (which was not specified in the mandate). *Id.* ¶¶ 1, 10-19. This reflects that a mandate does not necessarily preclude the trial court on remand from taking actions not specified in, but still in keeping with, the mandate. And *Martinez* does, indeed, particularly lend support to defendant's argument here because the initial mandate in *Martinez* was even more specific than ours here; indeed, it ordered the trial court to hold resentencing "in adult criminal court" and to apply new sections of the Code, yet it still concluded in the second appeal that the trial court should not have done so without first, pursuant to the amendments to the Act, allowing the State to petition for sentencing as an adult and holding a hearing on that question.

¶ 32 With respect to the mandate, the State here does not develop a substantive response to *Martinez*, arguing instead that we should not find it persuasive because the State there "inexplicably" conceded error. However, the State's agreement with the defendant's arguments there was certainly not binding on the appellate court (see, *e.g.*, *People v. Denson*, 2014 IL 116231, ¶ 10 (a party's concession does not bind the court)), particularly to the extent that it had to assess the scope of its prior mandate and whether the trial court lacked jurisdiction thereunder to hold the requested hearing.

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[5]The court in *Martinez*, 2018 IL App (1st) 132670-U, referred to resentencing the defendant under "the new statute" and cited section 5-4.5-100 several times. See, *e.g.*, *id.* ¶ 73. The references to section 5-4.5-100 appear to have been a scrivener's error, as section 5-4.5-105 was newly enacted and section 5-4.5-100 unchanged. See Pub. Acts 99-69, 99-258 (eff. Jan. 1, 2016).

¶ 33 The foregoing reflects that the scope of the mandate must be considered in the context of the decision that issued it, as well as the questions addressed and answered therein. Our prior analysis concerned the constitutionality of the sentence defendant received under the Code, particularly in light of rapidly changing jurisprudence—namely, the supreme court's decision in *Buffer* and the amendments to the Code. To put it informally, our decision held that defendant received a "flawed sentence" under the Code. But our decision did *not* address amendments or procedural changes to the *Act* or their applicability to defendant on remand, nor did we instruct the trial court in that regard. In fact, the court recognized exactly those circumstances, when, in ruling, the judge stated, "[t]he Appellate Court did not anywhere in their opinion discuss the consequences of the 2016 amendments applying retroactively in [defendant's] case and certainly didn't instruct me concerning this issue." The trial court read our lack of instruction on a question that was not before us as limiting its authority, when our lack of decision and absence of any instruction on the question, in fact, meant that considering defendant's motion and the State's alternative request to hold the section 5-130(1)(c)(ii) hearing would not have been inconsistent with the mandate.

¶ 34 B. Retroactivity

¶ 35 Our analysis does not end there, however, because the State argues that, even if the mandate did not preclude the trial court from holding a hearing, the Act's amendments are, for two reasons, not retroactive and do not apply to defendant. Defendant correctly notes that the State did not advocate this position below.[6] Rather, the State argued below that our mandate appeared to preclude the court from holding a section 5-130(1)(c)(ii) hearing but that, if not, the court *should* hold the hearing and sentence defendant as an adult. It repeatedly made the alternative request that the court hold the hearing under section 5-130(1)(c)(ii) of the Act and, in fact, moved alternatively, pursuant to section 5-130(c)(ii), for the court to sentence defendant under the Code. The State did not develop either portion of its retroactivity argument below to argue that the amendments do not apply and, in fact, requested the hearing that it now claims cannot occur. Thus, we need not consider this argument, as it is at odds with the position taken below. *Id.* ¶ 17. Indeed, while a prevailing party may generally defend a judgment on any basis appearing in the record, it may not advance a theory on appeal that is *inconsistent* with the position it took before the trial court. *Id.*; see *People v. Henderson*, 2013 IL 114040, ¶ 23; *People v. Franklin*, 115 Ill. 2d 328, 336 (1987).

¶ 36 Nevertheless, although the State's argument is completely inconsistent with its position below, we think it important to note that the State's retroactivity analysis in this case is simply incorrect. The State relies heavily on *People v. Hunter*, 2017 IL 121306, and contends that the Act's amendments do not apply retroactively to defendant, because there are no "ongoing proceedings" and, in any event, a remand "to the juvenile court for a discretionary transfer hearing" is impracticable. However, *Hunter* does not support the State's position here. Specifically, the court in *Hunter* reiterated its prior holding in *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 20, that the Act's amendments are procedural and, thus, they apply

[6]For this reason, the State's assertion on appeal that defendant forfeited any argument that section 5-130(c)(ii) applies to him retroactively, because he did not offer an argument in that regard in his opening brief, fails. Defendant had no reason to expect this proposition to be disputed, as the State had not raised retroactivity below.

retroactively to "pending cases" or "ongoing proceedings." *Hunter*, 2017 IL 121306, ¶¶ 22-23, 30. The court relied on section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2016)), which provides that, when a new procedural statute is adopted, the "proceedings thereafter" "shall conform, so far as practicable, to the laws in force at the time of such proceeding." See *Hunter*, 2017 IL 121306, ¶ 31. Accordingly, the court reasoned, "[s]ection 4 contemplates the existence of proceedings after the new or amended statute is effective to which the new procedure could apply." *Id.*

¶ 37 In contrast to *Howard*, however, where the defendant's case was pending in the trial court when the amendments took effect, the defendant's case in *Hunter* was pending on direct review when the amendments took effect. *Id.* ¶¶ 24-25. The *Hunter* court noted that the proceedings in the trial court were completed well before the statute changed; it stated that "this was not a case where we must decide whether the defendant should 'continue' to be prosecuted in adult court," and it was "also not a case where remand for further proceedings is necessitated by reversible error at trial." *Id.* ¶ 32. Indeed, the defendant in *Hunter* raised no claim of reversible error necessitating remand for further proceedings. *Id.* Rather, the defendant had challenged the sufficiency of the evidence on direct review, the appellate court had rejected that argument, and, so, there were no "proceedings thereafter" capable of conforming to the statute because "[n]othing remains to be done." *Id.*; see *People v. Easton*, 2018 IL 122187, ¶ 23 (appellate court erred where it determined that an amended version of a procedural rule applied retroactively to a case that was on appeal when the amendment became effective; there were no ongoing proceedings to which the amendment would apply; rather, the appellate court's decision simply "necessitate[d] new proceedings *in order to* apply an amendment to a procedural rule that postdated" the trial proceedings (emphasis added)). The court further noted that in none of the previous cases where it had found that statutes applied retroactively did it remand to the trial court *because* a new procedural rule had not been applied at a trial that preceded the statute, as remand in such circumstances would create inconvenience and waste judicial resources. *Hunter*, 2017 IL 121306, ¶ 36.

¶ 38 It seems obvious, therefore, that this case is unlike *Hunter*. Defendant's case was pending on appeal when the amendments took effect, but those amendments were not the *basis* for the remand to the trial court. Indeed, as previously discussed, they were not even addressed on appeal. Moreover, a judgment becomes final after sentencing and, therefore, proceedings remain ongoing where a defendant has been convicted but not sentenced, because something remains to be done. See *Clark*, 2020 IL App (1st) 182533, ¶ 70 (citing *People v. Price*, 2018 IL App (1st) 161202, ¶ 22 (holding that the amended section 5-130 applied to a sentencing hearing held after the 2016 amendments were enacted)). The State asserts that, despite our decision vacating defendant's sentence and remanding for resentencing, "there are no pending or 'ongoing proceedings' to which the amended rule would apply." Defendant characterizes the State's position as stunning, and we tend to agree. Indeed, the State repeatedly ignores that—unlike cases where nothing remained to be done—defendant's sentence was vacated, and the case was returned to the trial court *for additional proceedings* and, accordingly, proceedings were ongoing. The effect of vacating the sentence and remanding for a new sentencing hearing was the same as if defendant had not yet been sentenced. See *Hunter*, 2017 IL 121306, ¶¶ 54-55 (where "a defendant's sentence is vacated on appeal and the matter remanded for resentencing, under section 4 of the Statute on Statutes, the defendant may elect to be sentenced under the law in effect at the time of the new sentencing hearing"; however,

where the defendant makes no claim that error occurred in the trial court that would require vacating the sentence and remanding for resentencing, the defendant is not eligible to be sentenced under a newly enacted statute); *People v. Reyes*, 2016 IL 119271, ¶ 12 (*per curiam*) (where sentence was vacated and case remanded, the defendant was entitled to be resentenced under the new sentencing provisions); *People v. Carwell*, 2022 IL App (2d) 200495, ¶ 25 ("proceedings between conviction and sentencing are 'pending' under *Howard*"); *Martinez*, 2023 IL App (1st) 220844-U, ¶ 11 (recognizing that, once a case is remanded to the trial court for resentencing, it is no longer true that trial proceedings are concluded, for a conviction is not final until after sentencing).[7]

¶ 39 Finally, the State argues that part of the retroactivity analysis addresses practicability, such that, even if the amendment is retroactive, it need be applied only if "practicable." 5 ILCS 70/4 (West 2016) (new procedural rules apply to ongoing proceedings only "so far as practicable"). Here, the State contends, defendant's request "for a remand to the juvenile court for a discretionary transfer hearing" under the Act is not practicable, because he is over age 21 and the juvenile court has no jurisdiction over him. However, the State misstates the relief defendant requests. While, in *Hunter*, the supreme court held that the defendant's argument for retroactive application was also impracticable because he requested a *discretionary transfer* hearing *under the Act*—which would proceed in juvenile court and which was not possible for a defendant over age 21—it distinguished that situation from a defendant requesting, as defendant does here, a hearing in adult criminal court with respect to *sentencing*. *Hunter*, 2017 IL 121306, ¶¶ 38-41; see *Clark*, 2020 IL App (1st) 182533, ¶ 71 (noting that "[s]ection 5-130(1)(c)(ii) of the Act acknowledges this distinction between conviction and sentencing, as it provides that a defendant who is tried as an adult may be sentenced in juvenile court"). Indeed, where a defendant does not seek a discretionary transfer hearing in juvenile court but, rather, seeks a hearing to determine whether he or she should be sentenced as an adult (if the State files the required petition), multiple courts have found the request and the application of the amendments not impracticable; further, as the *Fort* court found, "[s]hould the trial court find after the hearing that defendant is not subject to adult sentencing, the proper remedy is to discharge the proceedings against defendant since he is now over 21 years of age and is no longer eligible to be committed as a juvenile under the Act." *Fort*, 2017 IL 118966, ¶¶ 30-31, 41; *Clark*, 2020 IL App (1st) 182533, ¶¶ 82-84; *Martinez*, 2023 IL App (1st) 220844-U, ¶ 19. Here, consistent with the aforementioned authority, defendant does not request a hearing in juvenile court or a discretionary transfer hearing; rather, he expressly requests that the trial court conduct a hearing in adult criminal court to consider whether he should be sentenced as an adult and, if not, that he be released because he is over age 21 and must be discharged. This is not impracticable.

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[7]The State suggests that the 2023 *Martinez* decision is inconsistent with the 2018 *Martinez* decision, which had rejected the defendant's argument that the amended Act applied retroactively to him *on appeal* (see *Martinez*, 2018 IL App (1st) 132670-U, ¶¶ 27-33). We disagree, as the court's 2018 holding recognized and was consistent with *Hunter*'s holding that, while the defendant's case was on appeal, the amendments did not create a basis for relief or an *independent* basis for remand, a point it later emphasized: "the amendments to the juvenile-sentencing law did, in fact, apply to [the defendant] when he was back in the circuit court for resentencing, though they did not while he was on appeal." *Martinez*, 2023 IL App (1st) 220844-U, ¶ 11.

¶ 40 C. Assignment to New Judge

¶ 41 Defendant also requests that, in the interest of fairness and justice and to avoid the appearance of any impropriety or prejudgment of the appropriate outcome, we remand for a new judge to conduct the section 5-130(1)(c)(ii) hearing. He asserts that remand to a different judge would remove from the new sentencing-related proceedings any suggestion of unfairness and would ensure a fair outcome at the section 5-130(1)(c)(ii) hearing. Defendant's request derives from the trial court's comments on October 11, 2022, when it was presented with the parties' agreement to reduce defendant's sentence to the minimum and which prompted his counsel to note for the record and in fairness to defendant that the court was "really, really angry" about the agreement. Accordingly, he contends that, based on the record and governing case law, ordering a new judge to hear his case would be appropriate. We disagree.

¶ 42 A reviewing court may reassign a matter on remand. Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967) (a reviewing court may "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken"); see *People v. Heider*, 231 Ill. 2d 1, 25 (2008) (remanding the case for resentencing before a different judge to remove any suggestion of unfairness). However, the parameters of our authority under this rule or the standards that should be applied when reassignment is considered have not been clearly defined, and these questions are currently pending before our supreme court. *People v. Class*, 2023 IL App (1st) 200903, *appeal allowed*, No. 129695 (Ill. Nov. 29, 2023). In *Class*, the appellate court considered whether the only valid basis for reassignment on remand in a criminal case is a finding of bias or actual prejudice on the part of the trial judge or if reassignment on remand was proper for reasons other than judicial bias, such as to remove any suggestion of unfairness. *Id.* ¶¶ 87-88. The appellate court determined that factors other than judicial bias may, in rare cases, require reassignment at the trial level and that, although error alone would almost never be a sufficient basis for reassignment, reassignment may be appropriate where the record inspires diminished confidence that a judge on remand would be able to set aside any previously expressed views or findings. *Id.* ¶¶ 88, 91.

¶ 43 Here, we decline to reassign the case to a different judge on remand, as the record does not support doing so under any standard; *i.e.*, it does not reflect either that the trial judge was actually biased against defendant or that it is necessary to do so to remove any suggestion of unfairness. Our confidence in the court's ability to fairly consider the case on remand is not undermined by the court's comments concerning the parties' agreement to reduce defendant's sentence or the court's apparent decision not to accept that agreement. The record reflects that, after resentencing defendant, the court was presented with an agreement to further reduce his sentence but, in its view, with no basis provided for doing so. As we summarized above, the court described at length why it was not prepared to accept the agreement. Defense counsel later described the court's demeanor as "really angry" and "mad," but even if that characterization is accurate, nothing suggests the court's ire was directed against *defendant*. Indeed, to the contrary, the court's comments expressed confusion and, possibly, frustration with both "parties" and, in particular, frustration that the petition did not set forth in writing a basis to further reduce defendant's sentence. Further, the court's comments also prompted the assistant state's attorney to interject and note for the record that the State had entered into the agreement with due consideration of the facts, possible success of defendant's postconviction claims, and upon consultation with the victim's family. As such, the court's reaction reflects

impartiality in the sense that both defendant and the State were subjected to its questions, confusion, surprise, and/or anger.

¶ 44 Further, the court reiterated on multiple occasions that it was willing to listen to the bases for the parties' proposal and would enter the agreement if, upon learning those bases, it deemed it appropriate; it also held a conference, per the parties' request, to discuss and consider the matter further. This reflects that the court was not predisposed to one conclusion, even if, ultimately, it did not proceed in the manner the parties hoped. Indeed, we note that defendant did not feel the court's comments or demeanor warranted moving for a substitution of judge for cause, and his counsel recognized before the hearing on the postconviction petition that she had no doubt that the court could continue to hear evidence and rule. And of course, now, the posture of the case has changed yet again. When first presented with the parties' agreement, the court had already resentenced defendant, but that sentence will now be vacated. We have no reason to believe that the court cannot fairly preside over any future proceedings on remand or that it will prejudge the outcome.

¶ 45 D. Remedy

¶ 46 In sum, the court erred on remand in sentencing defendant as an adult without first holding a hearing—in accordance with defendant's motion to be sentenced as a juvenile and the State's alterative request for a hearing pursuant to section 5-130(1)(c)(ii) of the Act—to determine if defendant should be sentenced as an adult under the Code. Consistent with the supreme court's holding in *Fort*, 2017 IL 118966, ¶¶ 41-43, the appropriate remedy is to remand the cause to the trial court with directions to vacate defendant's sentence and allow the State, if it wishes, to file within 10 days of the order vacating defendant's sentence a petition requesting a hearing for adult sentencing pursuant to section 5-130(1)(c)(ii). Should the State choose not to file the petition or the trial court finds, after the hearing, that defendant is not subject to adult sentencing, the proper remedy is to discharge the proceedings against defendant since he is now over 21 years of age and is no longer eligible to be committed as a juvenile under the Act. See *id.* ¶ 41 (citing 705 ILCS 405/5-755(1) (West 2008) and *In re Jaime P.*, 223 Ill. 2d 526, 539-40 (2006)). Nothing in this decision should be read as restricting the parties from again working to come to an agreement or any other statutorily permissible resolution or restricting the court, if the parties elect to proceed in that manner, from considering any such petitions or relevant pleadings.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we reverse the trial court's judgment denying defendant's motion to be sentenced as a juvenile and, implicitly, the State's alternative request for a hearing pursuant to section 5-130(1)(c)(ii) of the Act. We remand the cause to the trial court with directions to vacate defendant's sentence and allow the State, if it wishes, to file a petition requesting a hearing pursuant to section 5-130(1)(c)(ii) of the Act, and in accord with the timeline provided in the statute, the State must file its motion within 10 days of the date the trial court vacates defendant's sentence.

¶ 49 Judgment reversed; cause remanded with directions.